

No. 15,445

IN THE

United States Court of Appeals
For the Ninth Circuit

PLUMBING AND PIPE FITTING LABOR-
MANAGEMENT RELATIONS TRUST, et al.,

Appellants,

VS.

CONDITIONED AIR AND REFRIGERATION
Co., a corporation, et al.,

Appellees.

On Appeal from Order and Judgment of District Court.

BRIEF ON BEHALF OF APPELLEES.

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JURISDICTION.

We note with interest that no question is raised by appellants as to whether there is sufficient interstate commerce involved to confer jurisdiction upon the court.

This is as it should be. Although there was a challenge to the jurisdiction of the court below (Answer, Second Defense, R. 10, 11), the opinion of the District Court correctly declared:

“The fact that the jurisdictional amount of \$3,000 was expressly excluded from the pro-

visions of Sections 301 and 303 of the Labor Management Relations Act, 1947, as Amended, is not persuasive that the failure to make such exclusion in Section 302 operates to include such jurisdictional requirement. Sections 301 and 302 relate to suits for damages by private persons. Section 302 (a) and (b) make it unlawful to do the things proscribed by the provisions thereof. *It is public rights which are being protected*, and in my opinion the provisions of Section 302(e) grant jurisdiction to this court without regard to the sum or value in controversy if the volume of commerce of each plaintiff is not de minimis.” (Emphasis supplied.) (R. 73.)

The court below in its opinion referred to the decision of the Supreme Court of the United States in *NLRB v. Fainblatt*, 306 U.S. 601.

In that case the court said:

“The Act on its face thus evidences the intention of Congress to exercise whatever power is constitutionally given to it to regulate commerce . . .”

As this action is an action to protect and enforce a *public right* and *public policy* which Congress has declared in Section 302 of the statute and not merely an action to recover money paid under duress, the court should apply and carry out the public policy declared in Section 302 if there is any conceivable basis for the assertion of jurisdiction.

The facts here show ample commerce for the assertion of jurisdiction. (R. 71.)

DISCUSSION OF APPELLANTS' ARGUMENTS.

Appellants make three principal points in their opening brief. These will be discussed in the order of their presentation.

First: Appellants argue that cooperation between labor and management is desirable. They spend a considerable portion of their brief (pp. 5-19) discussing the "serious and pertinent social interests involved."

We do not yield to appellants in lauding the desirability of cooperation between labor and management. The argument, however, conveniently ignores the allegations of the complaint that

"Defendants are attempting to *compel* plaintiffs to pay and deliver money and other things of value to defendant 'Trust' ". (R. 5.) (Emphasis supplied.)

and

"to defendant 'Local Union No. 246' ", (R. 6.)

"and will, unless restrained by this Court, cause the aforesaid employees of plaintiffs to *strike* and cease working for plaintiffs unless and until plaintiffs pay and deliver said money and other things of value * * *." (Emphasis supplied.) (R. 6.)

The Answer alleges (R. 15) that

"Pipe Trades District Council No. 36 as the collective bargaining representative of the employees of plaintiffs, and each of them, covered by the 1952, 1953 Collective Bargaining Agreement and 1954 Amendment to the 1953 Collective

Bargaining Agreement *is prepared to cause said employees to strike* to obtain the inclusion of said Section 16 of Exhibit A in a Collective Bargaining Agreement with said plaintiffs, and each of them.” (Emphasis supplied.) (R. 15 and 16.)

Thus the “cooperation” involved in the present case is not entirely voluntary.

We do not know what considerations or pressures, economic or otherwise, led the employers, members of Associated Plumbing Contractors of Central California, Inc., to make and enter into the Trust Agreement.

We do say, however, that if the “cooperation” which appellants extol involves the payment of money or other things of value by an employer to a representative of his employees *the statute forbids it*. The statute makes no distinctions between voluntary and involuntary payments. *All* such payments are forbidden unless specifically listed under Section 302 (c) as excepted from the statute.

THE TRUST IS A REPRESENTATIVE OF PLAINTIFFS' EMPLOYEES BECAUSE IT PERFORMS SOME OF THE FUNCTIONS OF A LABOR ORGANIZATION.

Appellants carefully and painstakingly point out that the Valley Group Negotiating Committee and its successor, District Council No. 36, were *recognized* in the collective bargaining agreements as the *sole* and *exclusive* representative of plaintiffs' employees. (Appellants' Brief, p. 3.)

A mere *recital* in a contract cannot change the *facts*, however, and if the Plumbing and Pipe Fitting Labor-Management Relations Trust was, *in fact*, a representative of the employees of plaintiffs, any payment to it by plaintiffs was *forbidden* by the statute.

With respect to the meaning and definition of the term "representative" we quote from the opinion of the District Court as follows:

"The Labor Management Relations Act of 1947, as Amended, states: 'The terms "commerce", "labor disputes", "employer", "employee", "labor organization", "representative", "person", and "supervisor" shall have the same meaning as when used in sub-chapter II of this chapter as amended by this chapter.' Section 142, subsection 3, U.S.C.A. Title 29.

Section 152, subsection 4, Title 29 U.S.C.A., states: 'The term "representative" includes any individual (87) or labor organization.' Subsection 5 of Section 152 states: 'The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.'" (R. 78.)

When we examine the purposes and functions of the "trust" here involved we find that it is in fact and in law a "labor organization" and "representative" to which the various local unions, the Valley Group and the District Council have transferred some of the functions normally and traditionally performed by unions.

It is the function of a union not only to negotiate collective bargaining agreements but to *police* and *enforce* them when negotiated.

For example: The Labor Management Relations Act itself defines collective bargaining as follows (Sec. 8(d)):

“For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, *or the negotiation of an agreement, or any question arising thereunder.*” (Emphasis supplied.)

Thus the handling of *grievances and disputes under a contract* is included within the statutory *definition of collective bargaining*.

This is exactly what the “Trust” was set up to do. In order to spare the court unnecessary reading of a duplication of discussions we content ourselves with quotations from the opinion below as follows:

“Is the Plumbing and Pipe-fitting Labor Management Relations Foundation a ‘representative’ of the employees of plaintiffs? The Trust recites that ‘Whereas there is presently no effective machinery whereby the provisions of applicable collective bargaining agreements can be policed and enforced and whereby the general public can be protected from imperfect, improper and unsanitary installation, poor or shoddy materials or poor or improper work and workmanship, and

‘Whereas, the absence of such effective machinery is producing chaos in the Plumbing and

Pipe-fitting industry and is endangering the wages, rates of pay, hours of labor and other conditions of employment of the employees and destroying the trust and confidence of the public in the employers and in the plumbing and pipe-fitting industry.

‘Now, therefore, to correct this situation, to protect the wages, rates of pay, hours of labor, and other conditions of employment of the employees to restore the trust and confidence of the public in the employers and the plumbing and pipe-fitting industry, this Trust is created.’

“The stated purposes of the Trust are to perform and perfect ‘an organization for the purpose of improving the relationship between the employers and employees making up the plumbing and pipe-fitting industry and the general public, and to enforce the collective bargaining agreement and the provisions thereof covering work within the jurisdiction of the United Association of Journeymen and Apprentices of the (98) Plumbing and Pipe-fitting Industry of the United States and Canada, to protect the wages, rates of pay, hours of labor, and other conditions of employment of the employees in the plumbing and pipe-fitting industry and to protect the general public from imperfect, improper and unsanitary installations, poor or shoddy materials and poor or improper work and workmanship’

“The only specific purposes of the Trust are to enforce the collective bargaining agreement and the provisions thereof, covering work within the jurisdiction of the United Association of Journeymen and Apprentices of the Plumbing and Pipe-fitting Industry of the United States

and Canada, and to protect the wages, rates of pay, hours of labor and other conditions of employment of the employees in the plumbing and pipe-fitting industry. *The other stated purposes are vague and uncertain.* (Emphasis supplied.)

“The Trust agreement states that the Board of Trustees is authorized to, and *shall have the power to pay out of the assets of the Trust*, at the sole and exclusive discretion of the trustees, for, among other things, ‘to protect the wages, rates of pay, hours of employment, and other conditions of employment of the employees in the plumbing and pipe-fitting industry, * * * to enforce the collective bargaining agreements and the provisions thereof, covering work within the jurisdiction of the United Association of Journeymen and Apprentices of the Plumbing and Pipe-fitting Industry of the United States and Canada.’ The Board of Trustees is authorized ‘to employ such executive, administrative, accounting, clerical, secretarial and legal personnel and other employees and assistants, as may be necessary in connection with the carrying out of the Trust and to pay or cause to be paid, out of the Trust the compensation and (99) expenses of such personnel and assistants the cost of office space, furnishings and supplies and other expenses of the Trust.’

“It must be presumed that the Trust will carry out the specifically stated provisions for which it was formed, and which are above quoted. The Trust comes within the term ‘labor organization’ as defined in Subsection 5 of Section 152, Title 29 U.S.C.A., and is a ‘representative’ of the employees under Section 4 of Section 152. *It is my*

view that the Trust is a 'representative' of the employees of the plaintiffs." (Emphasis supplied.) (R. 88-91.)

After reading this clear and convincing statement in the opinion below it must be apparent that appellants' unqualified assertion (p. 21 Appellants' Brief) that the Trust "has no connection with the collective bargaining process at all" is so obviously incorrect that it casts doubt on appellants entire argument on this subject.

Appellants' argument (Appellants' Brief, pp. 25-28) that the Trust is not a "representative" within the meaning of Section 302 is circuitous. Reduced to its simplest terms, the argument advanced is that a representative is essentially an agent while a trustee is not; therefore, the Trust cannot be a representative. The fallacy of this reasoning is that it begs the very question in issue.

The Trust in this case is a representative *because it performs some of the functions of a representative as defined by law.*

Appellants devote one entire portion of their brief (pp. 28-31) to arguing that the Trust could not be a "representative" because it has been set up as an independent, quasi-judicial agency to hear and settle disputes.

Appellants state in their brief:

"One of the powers of the Joint Conference Board and therefore the Trust is to hear disputes and differences which may arise in the enforce-

ment of interpretation of the agreement.” (Emphasis supplied.) (Appellants’ Brief, p. 29.)

It will be noted that the most that appellants claim is that *one* of the powers of the Trust is to hear disputes and differences which may arise in the enforcement or interpretation of the agreement.

They do not go so far as to say that this is the *only* function of the Trust. They could hardly do so in view of the explicit language of the Trust declaring that “there is presently no effective machinery whereby the provisions of applicable collective bargaining agreements can be *policed* and *enforced* * * *”, and declaring that

“The *stated purposes* of this Trust are * * * to *enforce* the collective bargaining agreement * * * to protect the wages, rates of pay, hours of labor and other conditions of employment of the employees in the plumbing and pipe-fitting industry. * * *”

From this it will be seen that the Trust performs duties other than those of a judicial nature or acting as arbitrator. Those duties, by *definition of the statute*, are functions of a “*labor organization*” and a “*representative*”.

Even if, as appellants claim, the Trust were truly an independent agency (which we will later show it is not) if it performs the functions of a labor organization and *acts* as a representative of the employees, *the statute forbids employer payments to it.*

LOCAL 246 IS A REPRESENTATIVE OF THE EMPLOYEES
OF PLAINTIFFS.

Although appellants stoutly maintain that Valley Group Negotiating Committee and its successor District Council No. 36 are the *sole* and *exclusive* collective bargaining representatives of the employees of plaintiffs, it is apparent that *Local 246 is also a representative of the employees of plaintiffs.*

An examination of the 1955 collective bargaining agreement attached to the answer as Exhibit A will show many instances in which local unions (including Local 246) were referred to and clothed with powers to act and, in fact, required to act as the representative of plaintiffs' employees.

The court below in its opinion (R. 79-88) referred to and quoted these many instances and we will not burden this court by repeating them here.

In connection with Section 5 of the collective bargaining agreement entitled, "Union Membership" (R. 81), it will be noted that this section requires that all employees, as a condition of employment, shall apply for and become members of and maintain membership in the *Local Union* (in this case Local 246). It is axiomatic that a contract should be interpreted so as to conform to law, if possible. Under the law it is not permissible to require membership in any union *unless it is a representative of the employees.* (LMRA 1947 Sec. 8(a)(3).) The contract itself is therefore proof that Local 246 was and is a representative of the employees.

As the court below found, the conclusion is incapable that *Local 246 was and is a representative of the employees of plaintiffs.*

PAYMENTS TO THE SO-CALLED TRUST ARE PAYMENTS OF
MONEY OR OTHER THING OF VALUE TO LOCAL 246.

Now we come to the question whether payments to the Trust are payments of money or a thing of value to Local 246. Reduced to simplest terms the proposition of law is this:

Suppose that Local 246 wanted to exact a payment from employers of employees it represented. Section 302 of the statute forbids payment directly to Local 246.

If Local 246 said, "Pay this money to X who will do anything I want done with it", it is obvious that the payment, while in *form* to another was in *fact* a payment to Local 246 which had ultimate dominion and control over the disposition of these monies. No court, we believe, could help but conclude that this constituted a payment of money or other thing of value to Local 246.

We may borrow an analogy from inheritance tax, or estate tax law. If a person has a power of appointment which it is possible to exercise in his own favor, the power of appointment is taxable.

Even though an insurance policy is payable to a specified beneficiary it is treated differently according to whether the designation of beneficiary is irrevoc-

cable or whether the insured has reserved the right to change the beneficiary. Thus the *power to control* the disposition of moneys is taxable as property under the Federal and California laws.

It is most certainly a thing of value under these laws, and should also be under Sec. 302.

Now, suppose that Local 246 said to the employers of its members, "Pay this money to X who will do anything with it *we jointly* agree upon. We will build up a pot of money and then *we* will figure out what we will do with it. X will do as we tell him or we will fire him and replace him." X in this example is not a true trustee for two reasons: (1) There is no definite statement of the purpose of the trust. (2) The trustee is removable at the pleasure of the so-called trustors.

While the hypothetical case above set forth for purposes of illustration may possibly have over-simplified the matter, we believe that fundamentally and basically the facts of the case now before the court are not substantially different in any important respect.

1. Although there is a trust instrument, the purposes of the Trust are broad, vague and practically unlimited. In *fact* Local 246 and the employers can use the money for any purpose they agree upon.

2. The trustees are subject to removal and replacement at the pleasure of the parties appointing them. Ultimate control over disposition of the Trust fund is vested, not in the trustees, but

in the parties appointing them. They are therefore not trustees but mere agents.

The differences between a trust and a mere agency were pointed out by appellees themselves. In particular, one of appellants' citations illustrates the whole point of our argument.

We quote from page 27 of appellants' brief:

"The powers and duties of a trustee are radically different from those of an agent. *The agent's duty is primarily to his principal* for whom he acts and to whom he must account to the cestui que trust, although his authority comes from another. The agent represents and acts for his principal, but a *trustee has no principal* and cannot render the creator or beneficiary of the trust liable for his contracts. (Emphasis supplied.) (2 C.J.S. 1035.)"

As shown by appellee's own citation of authority, a true *trustee has no principal* but is guided solely by the *duties specified in the trust instrument* creating the trust. Such are not the facts here.

The question whether persons designated trustees are actually trustees or merely *agents or servants who hold legal title to property for the convenience of their principals* has frequently been considered in cases involving Massachusetts trusts. We quote from *Goldwater v. Altman*, 210 Cal. 408 at 416, as follows:

"Generally, stated, a trust of this nature is created wherever several persons transfer the legal title in property to trustees, with complete power of management in such trustees free from the control of the creators of the trust, and the

trustees in their discretion pay over the profits of the enterprise to the creators of the trust or their successors in interest. As thus defined it is apparent that such a trust is created by the act of the parties and does not depend on statutory law for its validity. In the case of *Hecht v. Malley*, 265 U. S. 144, 146 (68 L. Ed. 949, 44 Sup. Ct. Rep. 462, 463), Mr. Justice Sanford referred to such organizations as follows:

‘The “Massachusetts trust” is a form of business organization, common in that state, consisting essentially of an arrangement whereby property is conveyed to trustees, in accordance with the terms of an instrument of trust, to be held and managed for the benefit of such persons as may from time to time be the holders of transferable certificates issued by the trustees showing the shares into which the beneficial interest in the property is divided. These certificates, which resemble certificates for shares of stock in a corporation and are issued and transferred in like manner, entitle the holders to share ratably in the income of the property, and, upon termination of the trust, in the proceeds.

‘Under the Massachusetts decisions these trust instruments are held to create either pure trusts or partnerships, according to the way in which the trustees are to conduct the affairs committed to their charge. *If they are the principals and are free from the control of the certificate holders in the management of the property, a trust is created; but if the certificate holders are associated together in the control of the property as principals and the trustees are merely their managing agents, a part-*

nership relation between the certificate holders is created.'

“The leading case in Massachusetts where this so-called control test is fully discussed in *Williams v. Inhabitants of Milton*, 215 Mass. 1 (102 N.E. 355). In that case the question involved was whether the Boston Personal Property Trust was to be taxed as a partnership or as a trust. The court, after discussing certain cases holding the particular trust therein involved created a partnership, and others where it had been held that a trust had been created, stated (102 N.E. 357) that the distinction ‘lies in the fact that in the former cases the certificate holders are associated together by the terms of a “trust”, and are the principals *whose instructions are to be obeyed by their agent who, for their convenience, holds the legal title to their property, the property is their property*, they are the masters; while in *Mayo v. Moritz* (151 Mass. 481 24 N.E. 1083), where it was held the instrument created a trust), on the other hand, there is no association between the certificate holders, the property is the property of the trustees and the trustees are the masters. All that the certificate holders in *Mayo v. Moritz* had was a right to have the property managed by the trustees for their benefit. They had no right to manage it themselves nor to instruct the trustees how to manage it for them.’ ” (Emphasis supplied.)

Let us apply the above principles to the case at bar.

Section 2 of the Trust reads as follows:

“The Trustees appointed by the Associated Plumbing Contractors of Central California, Inc.

shall be appointed in writing and *shall serve at the pleasure of said Associated Plumbing Contractors of Central California, Inc.* The Trustees (20) appointed by the Union shall be appointed by the Union in writing and *serve at the pleasure of said Union.* Each original Trustee shall sign this Trust Agreement or a duplicate thereof, and such signature shall constitute his acceptance of office.” (Emphasis supplied.)

Under the principles announced in *Goldwater v. Altman, supra*, and particularly the quotation from *Williams v. Inhabitants of Milton, supra*, the power of removal and replacement of the trustees is such ultimate control over the trust and trust estate that those who exercise such power are the

“*principals* whose instructions are to be obeyed by their agent who, for their convenience, holds the legal title to their property. *The property is their property*, they are the masters. * * *” (Emphasis supplied.)

Thus this device not being a true trust, *legal and equitable ownership of the trust assets is vested jointly in the employer association and in the union.* They are just as much co-owners of the trust property and partners in its management and control as were the certificate holders in the Massachusetts trust cases. For these reasons payments by employers into the trust fund constitute payments of a thing of value to a representative of their employees.

We realize that many trusts *conforming* to the requirements of Section 302 provide for the removal and replacement of trustees. Those trusts, however,

have their purposes so *clearly spelled* out that they *must* be used *solely* for the benefit of *employees and their dependents*. The power of removal and replacement of trustees of such trust could *never* be exercised by a union to divert the Trust funds *to its own benefit without violating the Trust*.

It is the combination of (1) indefinite, almost unlimited purposes of the Trust, with (2) the power of removal and replacement which makes employer payments into the instant Trust payments of a "thing of value" to the Union.

We have seen that the so-called trustors in the case now before the court exercise absolute control over the trustees through the power of removal and replacement. Let us now examine the *purposes* of the Trust.

The Trust provides:

"Section 1. Subject only to the limitations hereinafter set out the Board of Trustees are authorized to and shall have the power to pay out the assets of this Trust to any person, firm, corporation, association whether incorporated or unincorporated or trust *at their sole and exclusive discretion for the general (23) welfare of the Plumbing and Pipe Fitting Industry* and without in any way limiting the foregoing for the purpose of improving the relations between employers and employees making up the Plumbing and Pipe Fitting Industry, and the general public and to protect the wages, rates of pay, hours of labor, and other conditions of employment of the employees in the Plumbing and Pipe Fitting Industry, to protect the general public from imperfect,

improper and unsanitary installations, poor or shoddy materials and poor or improper work and workmanship, to enforce the collective bargaining agreements and the provisions thereof covering work within the jurisdiction of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada.” (Emphasis supplied.) (R. 28.)

It is apparent from the above language that the trust property can be used *for any purposes the Union and the employer association agree upon*. This combination of broad and indefinite purposes, together with ultimate direction and control over the trustees through the power of removal and replacement we believe requires the following conclusions:

1. No trust was created.
2. The so-called trustees are mere agents.
3. Title and control of the Trust assets were vested jointly in the Union and the employers' association.
4. Any payments into such fund were payments to a “representative” forbidden by the statute.

The conclusion that no true trust was created is further supported by the fact that there are *no beneficiaries capable of enforcing the so-called Trust* except the parties who are themselves the founders and creators of the Trust, namely, the employer association and Local 246.

CASES RELIED ON BY APPELLANTS.

Counsel for appellants refer to certain decisions in support of their position. In order not to duplicate the work of this court we content ourselves with reproducing the discussion of these cases in the opinion below:

“The defendants have cited the cases of *United Marine Division v. Essex Transportation Company*, 216 Fed. 2d 410; *Rice-Stix Dry Goods Company v. St. Louis Labor Health Institute*, D.C.E. Mo. 22 LRRM 2528; *People v. Cilento*, 143 N.Y.S. 2d 705; and *Bay Area Painters and Decorators Joint Committee, Inc. v. Orack*, 102 C A 2d 81. In the *Essex* case, payments by the employer were to be made to six trustees of a welfare fund. From aught that appears in the opinion of the Court the Trust providing for the welfare fund was in strict compliance with the requirement of Section 302 (c) (5). Admittedly, the Trust here involved does not so comply. In the *Rice-Stix* case, the Court concluded that the Health Institute was a corporation independent of the labor union which was a representative of the bargaining unit of the employees of the plaintiff. The fund created was to be used for health purposes. In neither of the cases was there a trust agreement containing provisions such as the quoted provisions of the Trust here in question. The *Cilento* case involved a construction of the Penal Statute of the State of New York, and in my opinion, the correct decision was reached under the facts and the applicable law.

“In the *Orack* case, the Court determined that the agreement in question did not constitute a monopoly or a restraint of trade under the law

of the State of California. It did not involve Section 302 of Title 29 U.S.C.A. (101).” (R. 92.)

CONCLUSION.

The main effort of appellants’ brief appears to consist in a determined plea for approval of the “Trust” on the grounds that it serves a socially desirable purpose. But what this argument boils down to is simply a contention that Section 302 (c) (5) *ought* to permit trust funds for the purpose of enforcing collective bargaining agreements, and that, therefore, the statute should be so construed. We submit that appellants’ argument should be addressed to the Congress and not to the courts. The courts, in performing their proper judicial functions, cannot construe this statute as claimed by appellants.

It is respectfully submitted that the court below acted properly in carrying out the policies announced by Congress in the manner specified by the statute by issuing the injunction in this case and its order and decision should be affirmed.

Dated, San Francisco, California,
July 18, 1957.

Respectfully submitted,

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